

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICKY BERBERICH)	
Claimant)	
VS.)	
)	
USD 609 SE KS REGIONAL EDUCATIONAL CENTER)	Docket No. 1,003,648
)	
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF SCHOOL BOARDS WC FUND, INC.)	
)	
Insurance Carrier)	

ORDER

This matter is before the Workers Compensation Board (Board) on remand from the Kansas Court of Appeals from its November 9, 2007 unpublished Memorandum Opinion in No. 97,463. The matter was decided by the Board in its Order dated September 18, 2006. The Court of Appeals determined that the Board, in its decision, failed to determine the post-award benefits due for the injuries alleged on March 15, 2001, and what, if any, benefits would be due for those alleged injuries in Docket No. 1,003,648. The matter was remanded to the Board for a determination of the post-award benefits due, if any, from the 2001 injury.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas.

The Board has considered the record and adopts the stipulations as set forth in its Order of September 18, 2006.

ISSUES

1. Has claimant suffered an aggravation as a direct and natural consequence of her injuries originally suffered on March 15, 2001, while working for respondent USD 609?
2. If claimant did suffer an aggravation of the injuries suffered on March 15, 2001, while working for USD 609, is she entitled to post-award medical treatment for the aggravation of those injuries?

FINDINGS OF FACT

This matter was remanded to the Board after the Court of Appeals determined that the Board had failed to decide all of the issues raised in the appeal from the May 24, 2006 Post-Award Medical & Preliminary Order of Administrative Law Judge Kenneth J. Hursh. The Court of Appeals determined that the Board had only listed and decided one issue. That issue, as listed in the September 18, 2006 Order of the Board, was whether the Administrative Law Judge (ALJ) had erred in finding that claimant did not meet with personal injury by accident arising out of and in the course of her employment with USD 637 in Docket No. 1,020,191.

In her brief to the Board, claimant argued that, in the alternative, "the ALJ erred by denying additional medical treatment stemming from her original Award in the way of treatment for carpal tunnel or cubital tunnel syndrome contrary to the evidence and her prior Award in Docket No. 1,003,648".¹ The Board decided the first issue raised by claimant, but did not decide the second issue.

Claimant suffered an accidental injury arising out of and in the course of her employment with USD 609 on March 15, 2001, when an autistic child she was working with grabbed her right arm. Claimant suffered injuries to her right shoulder and neck and was awarded benefits by the ALJ for a 13 percent permanent partial whole body disability. The Board, in its Order of February 20, 2004, increased the disability to a 17 percent permanent partial whole body disability. In the Post-Award Medical & Preliminary Order of the Administrative Law Judge, claimant was allowed additional medical treatment for her neck condition, as recommended by Paul S. Stein, M.D., a board certified neurological surgeon. Additional medical treatment, for claimant's alleged carpal tunnel syndrome and cubital tunnel syndrome, and added permanent disability from the March 15, 2001 injury, for the carpal tunnel syndrome and cubital tunnel syndrome conditions, were denied.

¹ Claimant's letter brief to the Board, filed July 5, 2006, at 1.

Claimant was referred to Dr. Stein on September 18, 2002, for an evaluation of the extent of injuries resulting from the March 15, 2001 accident. In his report of that date, Dr. Stein found the mild carpal tunnel syndrome in claimant's right upper extremity was not related to the March 2001 injury, based on the mechanism of injury. Left carpal tunnel syndrome and cubital tunnel syndrome were not diagnosed by Dr. Stein at that time. The medical records of Dr. Kevin Komes, including EMG/NCT tests performed on March 27, 2001, were reviewed by Dr. Stein. These records indicated mild carpal tunnel syndrome in claimant's right hand. However, the medical reports of Dr. Komes also indicated that claimant had been suffering numbness in her hands for almost two years previous to her March 15, 2001 injury.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on May 24, 2002. Dr. Prostic diagnosed claimant with cervical disc disease at C5 to C7, including reverse cervical lordosis, and frozen shoulder syndrome, from severe demineralization of the tuberosities of the humerus. Dr. Prostic noted an EMG by Dr. Komes showed mild carpal tunnel syndrome on the right side, but Dr. Prostic had no medical records showing treatment for preexisting numbness in claimant's upper extremities. Dr. Prostic found the March 15, 2001 injuries to include claimant's neck and right shoulder. He does not conclude, in the report of May 24, 2002, that the carpal tunnel syndrome arose from the March 15, 2001 accident. Dr. Prostic did discuss, during his deposition of April 28, 2003, the positive EMG studies of Dr. Komes and the mild carpal tunnel syndrome on the right side. He concluded claimant suffered injuries to her cervical spine and right shoulder and that she developed right side carpal tunnel syndrome from the accident of March 15, 2001. There was no mention of left carpal tunnel syndrome or right or left cubital tunnel syndrome in the report generated from the May 24, 2002 examination or during Dr. Prostic's deposition of April 28, 2003. Dr. Prostic also testified on January 23, 2006, that claimant's weakness of grip from his first examination was more characteristic of cubital tunnel syndrome than carpal tunnel syndrome. This would appear to cloud the causation issue in this matter, as cubital tunnel was not even mentioned the first time around. The ALJ, in his Post-Award Medical & Preliminary Order of May 24, 2006, determined that claimant had failed to prove that she required medical treatment for carpal tunnel or cubital tunnel syndrome related to the injury of March 15, 2001, in Docket No. 1,003,648.

Claimant filed a second claim in Docket No. 1,020,191, alleging an accidental injury while employed with USD 637 for a series of accidents through November 18, 2004. Claimant argued that the repetitive nature of her work caused her to develop right carpal tunnel syndrome and right cubital tunnel syndrome. The ALJ, in reviewing the medical evidence of Dr. Stein and Dr. Prostic, found claimant's allegations to be unsupported by the record. The ALJ found the testimony of Dr. Stein to be the more credible and denied claimant any permanent disability for the alleged carpal tunnel and cubital tunnel conditions. The Board, after viewing the same medical evidence as was presented at the earlier preliminary hearing, found the decision of the ALJ to be supported by the record.

and affirmed the denial of any permanent disability. That matter was not appealed to the Court of Appeals and is not before the Board at this time.

Claimant requests the Board reverse the ALJ and order respondent USD 609 to provide care and treatment for claimant's carpal tunnel syndrome as a natural consequence of the March 15, 2001 accident. Respondent contends the Award of the ALJ, wherein the ALJ found the March 15, 2001 accident has no connection to claimant's need for carpal tunnel and cubital tunnel syndrome treatment, should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁵

The ALJ determined that the opinion of Dr. Stein, that the mechanism of injury related to the March 15, 2001 accident would not have caused carpal tunnel syndrome, was the most persuasive. The Board agrees. Even Dr. Prostic, claimant's expert, did not believe the left carpal tunnel and bilateral cubital tunnel conditions resulted from the March 15, 2001 injury. He determined, rather, that those conditions were the result of repetitive activities occurring after the 2001 date of accident. The Board finds that claimant

² K.S.A. 44-501 and K.S.A. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 44-501(a).

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

did not prove that she required medical treatment for the carpal tunnel syndrome or the cubital tunnel syndrome due to the injury of March 15, 2001, in Docket No. 1,003,648. Therefore, the decision of the ALJ denying treatment should be affirmed.

CONCLUSIONS

Claimant has failed to prove that either her carpal tunnel syndrome or her cubital tunnel syndrome is a direct and natural consequence of the injury suffered on March 15, 2001, in Docket No. 1,003,648. Therefore, the denial of benefits by the ALJ is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Post-Award Medical & Preliminary Order of Administrative Law Judge Kenneth J. Hursh, dated May 24, 2006, in Docket No. 1,003,648, should be and is affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge